83-511

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE CONTINENTAL GROUP, INC.,

Petitioner,

v.

VERONICE A. HOLT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit ignored *City of Los Angeles v. Lyons*, _ U.S. _, 103 S. Ct. 1660 (1983), and other precedent of this Court by holding that the possible "chilling effect" on other employees' pursuit of their own claims of employment discrimination provides standing to a discharged employee to obtain preliminary injunctive relief in a retaliatory discharge action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

2. Whether the Second Circuit ignored *City of Los Angeles v. Lyons*, _ U.S. _, 103 S. Ct. 1660 (1983), and other precedent of this Court in requiring the District Court to decide, on a motion for preliminary injunctive relief, whether other employees might be deterred from providing testimony for the plaintiff in a retaliatory discharge case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, even though plaintiff never alleged that anyone has been or may be deterred from testifying in her behalf.

THE PARTIES

The parties before this Court are those set forth in the caption.*

* Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner states that it is the corporate parent, and that other than The Vinoxen Company, Inc., a Texas corporation, Petitioner has no first-generation subsidiaries or affiliates (other than wholly-owned subsidiaries).

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VERONICE A. HOLT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The Continental Group, Inc. respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 24, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 708 F.2d 87, and is annexed hereto as Appendix A. The District Court's opinion is reported at 542 F. Supp. 16, and is annexed hereto as Appendix B.

JURISDICTION

The opinion and order of the Court of Appeals was entered on May 24, 1983. A timely petition for rehearing and rehearing *en banc* was denied on July 21, 1983, and this petition for

certiorari was filed within 90 days of that date. The order denying rehearing is annexed hereto as Appendix C.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) provides that:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 706(f)(2) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(2) provides that:

> (f)(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

STATEMENT OF THE CASE

Respondent Veronice A. Holt ("Holt") is a black female lawyer who was employed by petitioner The Continental Group, Inc. ("Continental") in its Legal Department from October 18, 1976 to January 20, 1982. At the time of her discharge, Holt was serving as Securities Counsel to Continental.

In October of 1981, Holt filed a complaint with the Connecticut Commission on Human Rights and Opportunities ("CCHRO") alleging that Continental had discriminated against her on the basis of race and sex by denying her promotions and other opportunities. On December 10, 1981, Holt filed another complaint with CCHRO alleging that Continental had engaged in "retaliatory conduct," primarily by giving her an "unfair"

performance evaluation ("fully satisfactory") after she filed her initial complaint.* Continental discharged Holt on January 20, 1982 on the grounds, among others, that she was unable to get along with and disrupted the work of other attorneys, had disregarded direct orders from her superiors, and had lost the confidence of Continental's executives in her judgment for reasons unrelated to her complaint.

On February 16, 1982, Holt sued Continental in the United States District Court for the District of Connecticut under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging retaliatory discharge.** Holt's complaint sought only one remedy: a preliminary injunction ordering her reinstatement as Securities Counsel pending the completion of the CCHRO administrative proceedings.

After the evidentiary hearing and extensive briefing, the District Court held that Holt had "failed to make the requisite showing of irreparable harm to justify injunctive relief." *Holt v. The Continental Group, Inc.*, 542 F. Supp. 16, 18 (D. Conn. 1982) (Appendix hereto at 16 ("A-16")). Specifically, the District Court found that "financial distress or inability to find other employment, absent extraordinary circumstances, falls short of the type of irreparable injury which is a necessary predicate to the issuance of injunctive relief," and that, in any event, Holt had "failed to pursue other employment opportunities." 542 F. Supp. at 18 (A-17).

The Court of Appeals agreed with the District Court that "the requisite irreparable harm is not established in employee discharge cases by financial distress or inability to find other employment, unless truly extraordinary circumstances are shown. *Sampson v. Murray*, 415 U.S. 61, 91-92 n.68 (1974); *EEOC v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980)." *Holt v. The Continental Group, Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983) (A-7). Nevertheless, the Court of Appeals reversed.

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* These claims are presently pending before the CCHRO.

** Holt invoked the District Court's jurisdiction under 28 U.S.C. § 1343(4) (action for equitable relief under a civil rights statute).

The Court stated, without citing any authority, that "[a] retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under [Title VII] or from providing testimony for the plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury." 708 F.2d at 91 (A-7). Accordingly, the Court of Appeals remanded this action to the District Court with instructions to determine whether these risks, under the facts of this case, satisfy the irreparable injury requirement for preliminary injunctive relief. The Court so ruled despite the fact that neither Holt's complaint* nor her motion for preliminary injunction** alleged that any current or former employees had been deterred by Holt's discharge or for any other reason from testifying *in her behalf* before the CCHRO.

Both parties moved for rehearing and rehearing *en banc*. On July 21, 1983, the Court of Appeals denied both parties' motions without opinion (A-20,21).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Conflicts With *City of Los Angeles v. Lyons*, _ U.S. _, 103 S. Ct. 1660 (1983)

A. The Decision of the Court of Appeals Conflicts with *Lyons* and Other Holdings of this Court that the Threat of Injury to Parties Other than the Plaintiff Does Not Confer Standing Upon a Private Plaintiff Seeking Injunctive Relief

In *City of Los Angeles v. Lyons*, *supra*, this Court held that an individual plaintiff seeking injuctive relief must, in order to satisfy Article III standing requirements, allege in his complaint facts sufficient to establish a strong likelihood that absent relief *he* will sustain direct injury. If this prerequisite is not satisfied,

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* Holt's complaint is annexed hereto as Exhibit D.

** Holt's motion for preliminary injunction is annexed hereto as Exhibit E.

the issuance of a preliminary injunction may not be considered even if, as in *Lyons*, the complaint does allege facts sufficient to state a claim for some form of ultimate relief.*

In *Lyons*, the plaintiff had obtained a preliminary injunction against the Los Angeles Police Department prohibiting the use of chokeholds absent a threat of serious bodily injury. This Court reversed and held that the plaintiff lacked Article III standing to seek injunctive relief because his pleadings failed to adequately allege that he not only had suffered injury in the past but would suffer irreparable future injury if an injunction was not issued. 103 S. Ct. at 1667-70. Moreover, this Court held that to satisfy this burden, Lyons was required to allege facts indicating a strong likelihood that he would again be subjected to a chokehold. *Id.*

The Court of Appeals' ruling below disregarded *Lyons* by holding that a private plaintiff may satisfy the irreparable injury prerequisite to preliminary injunctive relief by merely demonstrating that nonparties will suffer some "chilling effect" from her own alleged retaliatory discharge. *Holt v. The Continental Group, Inc.*, 708 F.2d at 91 (A-7,8). In so holding, the Court of Appeals ruled that the possibility that other persons may be deterred from protecting their own Title VII rights confers Article III standing upon a discharged employee who otherwise can demonstrate no irreparable injury to seek reinstatement pending the outcome of administrative proceedings. This rule of third-party standing cannot be reconciled with *Lyons*.

Under *Lyons* and its antecedents, Holt lacks standing to seek a preliminary injunction to eliminate the possibility that other employees might be deterred from protecting their rights. She is not harmed, irreparably or otherwise, if other employees fail to file discrimination complaints against Continental or other entities any more than Lyons was by the possibility that chokeholds might be applied to others. Thus as an individual plaintiff representing only herself, she has no standing to pursue in federal court other people's potential claims. *See also Glad-*

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* *Lyons* acknowledged that the complaint had alleged a claim for damages that "appears" to satisfy Article III requirements. 103 S. Ct. at 1669.

stone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). In short, Holt's standing to litigate the hypothetical chilling effect of her discharge on other employees is weaker than the plaintiff's in *Lyons* where the Court noted:

> [E]ven if the complaint must be read as containing an allegation that officers are authorized to apply the chokeholds where there is no resistance or other provocation, it does not follow that Lyons has standing to seek an injunction against the application of the restraint holds in situations that he has not experienced, as for example, where the suspect resists arrest or tries to escape but does not threaten the use of deadly force. Yet that is precisely the scope of the injunction that Lyons prayed for. . . .

City of Los Angeles v. Lyons, supra, 103 S. Ct. at 1667-68 n.7. Holt has not alleged that she was deterred by Continental from protecting her own Title VII rights—nor can she, since she is vigorously pursuing this action and the proceeding before the CCHRO.

The Second Circuit cited no authority for its novel ruling that an individual bringing a retaliatory discharge claim is exempt from the traditional equitable requirement that she demonstrate irreparable injury to herself in order to obtain injunctive relief. By so holding, it departed from this Court's ruling in *Sampson v. Murray, supra*, 415 U. S. at 91-92 n.68, that traditional irreparable injury standards apply to individual actions based upon termination of employment. Such an innovation is unsupportable. There is nothing in the text or legislative history of Title VII which supports the Second Circuit's ruling.

Indeed, the legislative history of the 1972 amendments to Title VII which authorized the EEOC to bring enforcement actions clearly establishes that Congress intended to require a showing of irreparable harm in preliminary injunction applications to the extent that equity has traditionally required. *See EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037, 1041-42 (6th Cir. 1981) (Senate proposal to dispense with irreparable injury

requirements rejected by joint Senate-House conference; "showing of irreparable injury to the extent that equity has traditionally required" finally adopted). Where Congress has intended that special procedural standards govern Title VII actions, it has so provided. *See General Telephone Co. of The Southwest, Inc. v. Falcon*, 457 U.S. 147 (1982) (Although Title VII class action brought by EEOC need not meet Fed. R. Civ. P. Rule 23 standards, private Title VII class action must). The Second Circuit's ruling permits individual aggrieved employees to upset the carefully drafted legislative scheme by litigating the rights of third parties which Congress has provided can only be litigated by the EEOC and *only* if "the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes" of Title VII. 42 U.S.C. § 2000e-5(f)(2). *EEOC v. Pacific Press Publishing Association*, 535 F.2d 1182, 1185 (9th Cir. 1976); *EEOC v. Anchor Hocking Corp., supra*, 666 F.2d at 1044.

Finally, even if, contrary to *Lyons*, an individual plaintiff could in some circumstances have standing to seek preliminary injunctive relief on the ground that others are threatened with injury, Holt's conclusory allegation that in the absence of injunctive relief "Defendant will have succeeded in creating a 'chilling effect' on the exercise of their legal rights by all persons protected by Title VII and the Civil Rights Acts of 1866 and 1870, who are employed by the Defendant" (Comp. ¶66) (A-39) additionally fails to satisfy *Lyons'* requirement that *facts* be alleged which establish the substantial likelihood of future injury. Plaintiff's allegation has even less factual content than Lyons' that he "and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life . . . ." 103 S. Ct. at 1663.

B. The Decision of the Court of Appeals Conflicts with *Lyons'* Holding that Plaintiffs Seeking Injunctive Relief Must Allege Facts Sufficient to Establish Irreparable Injury

The Court of Appeals also instructed the District Court to consider the hypothetical possibility that other employees might be deterred from testifying on Holt's behalf by her discharge as

grounds for granting injunctive relief despite the fact that Holt has not alleged such injury in her complaint or, indeed, at any stage of the proceedings.* *Lyons*, however, forbids such consideration. For the reasons set forth in *Lyons*, federal courts may not adjudicate motions for injunctive relief in the absence of a complaint which contains allegations sufficient to establish irreparable injury to the plaintiff. 103 S. Ct. at 1667-69. In the absence of such allegations, according to *Lyons*, the plaintiff lacks standing to seek injunctive relief. *Id.* Indeed, Holt's claim for injunctive relief is even less cognizable than that considered in *Lyons*, where the plaintiff at least purported to allege exposure to future injury, though with insufficient concreteness to satisfy Article III. *Id.*

Lyons held that the claim for injunctive relief could not be litigated because the complaint contained no allegation that chokeholds are always applied by the Los Angeles police to citizens who are stopped absent provocation or resistance, or that the police are authorized to act in such a manner. 103 S. Ct. at 1667. The Court required that in order to state a claim for injunctive relief, the allegations must demonstrate a probability of future injury to the plaintiff. *Id.* at 1668. Here, Holt's complaint does not even refer to the injury hypothesized by the Second Circuit, that is, the failure of witnesses to come forth.

In light of the apparent disregard of *Lyons* below, both a grant of certiorari and summary reversal are appropriate. *Cardwell v. Taylor*, _ U.S. _, 103 S. Ct. 2015 (1983) (per curiam); *Immigration and Naturalization Service v. Miranda*, _ U.S. _, 103 S. Ct. 281 (1982) (per curiam).

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* Moreover, the record does not contain any evidence of such a chilling effect. CCHRO, the agency responsible for investigating Holt's administrative complaints, has nowhere suggested that any potential witness has been unwilling to offer evidence. Thus the Second Circuit instructed the District Court to address a hypothetical question which the federal courts lack jurisdiction to adjudicate. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). *See also Sampson v. Murray, supra*, 415 U.S. at 88-89.

2. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeals Concerning the Availability of Injunctive Relief to a Private Plaintiff in the Absence of Irreparable Injury

The Second Circuit held that a private Title VII plaintiff seeking only her own reinstatement may satisfy the irreparable injury requirement by establishing that her discharge will have a "chilling effect" on the exercise of rights by other employees of her former company.* 708 F.2d at 91 (A-7,8). This Court should grant the writ of certiorari to resolve the conflict this decision creates with the rulings of the Courts of Appeals for the Sixth and Ninth Circuits.

In *EEOC v. Pacific Press Publishing Association*, 535 F.2d 1182 (9th Cir. 1976), which involved both EEOC and individual injunctive actions, the Ninth Circuit noted the EEOC's "relaxed" burden for obtaining preliminary injunctive relief in a retaliatory discharge action brought by the Commission, and attributed this standard to the EEOC's "statutory authority . . . to seek judicial relief against Title VII violations." 535 F.2d at 1187.** The Court contrasted this "relative ease" of obtaining injunctive relief with the traditional standards which pursuant to *Sampson v. Murray, supra*, 415 U.S. at 90-91 n. 68, it required private litigants to meet in Title VII injunctive actions for reinstatement:

> This [the relaxed standard applied to the EEOC] is in sharp contrast with the burden the charging parties must assume if they seek preliminary injunctive relief in their private action. There they must show irreparable harm *to them* if the injunction did not issue. [citing *Sampson v. Murray*, 415 U.S. 61 (1974)].

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* The Court of Appeals did note that it did not "accept the EEOC's suggestion [as *amicus curiae*] that there is irreparable injury sufficient to warrant a preliminary injunction in every retaliation case—a view that has been rejected by the Sixth Circuit even when the EEOC was plaintiff. *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981)." 708 F.2d at 91 (A-7,8).

** *See* U.S.C. § 2000e-5(f)(2), reproduced at p. 3, *supra*.

EEOC v. Pacific Press Publishing Association, 535 F.2d at 1187 (emphasis added).

Similarly, the Sixth Circuit in *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981), held that the EEOC may obtain injunctive relief by showing that its ability to prosecute charges of employment discrimination has been impeded by the alleged retaliation. In contrast, however, the Sixth Circuit concluded that when the discharged party is the plaintiff, she must show that *she* "will in fact suffer irreparable harm if [s]he is not reinstated." 666 F.2d at 1043.

Plainly the Sixth and the Ninth Circuits would have affirmed the District Court's denial of injunctive relief in *Holt*. Both Circuits properly limited irreparable harm based on third party "chilling effects" to those actions brought by the EEOC in aid of its statutory investigative and enforcement powers.

This conflict between the Sixth and Ninth Circuits on the one hand and the Second Circuit on the other concerns an issue of the utmost importance to the administration of Congress' carefully constructed scheme for enforcing Title VII. Congress intended that the EEOC and state agencies would be the primary guarantors of Title VII protections. *See* H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News 2137, 2146 (1972) ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases"); H. Rep. No. 88-914, 88th Cong. 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 2391, 2401 (1964) (Title VII creates the EEOC and "delegates to it the primary responsibility for preventing and eliminating unlawful employment practices."). The statute provides an efficient enforcement mechanism based in large part upon the primary jurisdiction of the EEOC and state deferral agencies such as the CCHRO in *Holt*. *See* 42 U.S.C. § 2000e-5(c); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To this end, Congress explicitly accorded the EEOC, but not individual claimants, broad discretionary authority to seek a preliminary injunction whenever "prompt judicial action is necessary to carry out the purposes of [Title VII]." 42 U.S.C. 2000e-5(f)(2).

In contrast, the Second Circuit's ruling in *Holt* affords individual plaintiffs who cannot show irreparable injury to themselves the means of circumventing this enforcement mechanism. *Holt* requires the federal district courts, in private actions, to adjudicate third-party Title VII rights which only the EEOC has standing to litigate. The likely result of the Second Circuit's ruling, contrary to legislative intent, will be judicial backlog caused by numerous suits seeking immediate, emergency relief brought by discharged parties excused from the need to show the personal irreparable injury required by traditional equitable standards and this Court's precedents. The ruling below should be reviewed in light of its conflict with the traditional irreparable injury standard properly required by the Sixth and Ninth Circuits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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9-26-83

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 550—August Term, 1982

Argued: December 17, 1982 Decided: May 24, 1983

Docket No. 82-7542

VERONICE A. HOLT,

Plaintiff-Appellant,

—v.—

THE CONTINENTAL GROUP, INC.,

Defendant-Appellee.

Before:

FRIENDLY and NEWMAN, *Circuit Judges*,
and WYZANSKI, *District Judge.**

Appeal from a judgment of the District Court for the District of Connecticut (Robert C. Zampano, Judge)

* The Honorable Charles E. Wyzanski, Jr. of the United States District Court for the District of Massachusetts, sitting by designation.

denying a preliminary injunction and dismissing a complaint alleging discrimination and retaliatory conduct in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 (1976).

Reversed and remanded. Judge Friendly concurs in the result with a separate opinion.

VERONICE A. HOLT, Stamford, Conn. *pro se*, *for plaintiff-appellant*.

WILLIAM A. KANDEL, New York, N.Y. (William Hughes Mulligan, Dorothy B. Symonds, and Skadden, Arps, Slate, Meagher & Flom, New York, N.Y., on the brief), *for defendant-appellee*.

(MICHAEL M. MARTINEZ, Acting Gen. Counsel, Philip B. Sklover, Asst. Gen. Counsel, Sandra G. Bryan, Washington, D.C., submitted a brief for Amicus Curiae Equal Employment Opportunity Commission.)

NEWMAN, *Circuit Judge*:

Veronice A. Holt, a Black female lawyer, appeals from a judgment of the District Court for the District of Connecticut (Robert C. Zampano, Judge) denying a preliminary injunction and dismissing her complaint brought under both Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), and 42 U.S.C. § 1981 (1976). For the reasons that follow we conclude that, though the denial of a preliminary injunction may well have been proper, further consideration of that request is warranted to provide assurance that a pertinent consideration was not overlooked.

Holt was employed by Continental Group, Inc. (CGI) engaged primarily in securities work. On October 22, 1981, she filed a complaint with the Connecticut Commission on Human Rights and Opportunities (CCHRO) alleging that CGI had discriminated against her on the basis of race and sex by denying her a promotion and in other respects. On December 10, 1981, she filed an additional complaint with the CCHRO alleging that CGI had engaged in "retaliatory conduct," notably, giving her an adverse performance evaluation because of her initial complaint. On January 20, 1982, CGI discharged Holt by letter effective two days later.

On February 16, 1982, the plaintiff brought this action in the District Court complaining of both discriminatory treatment and retaliatory conduct. She alleged many of the facts she had reported to the CCHRO and added a further claim that her discharge was in retaliation for her complaints to the CCHRO. The complaint sought only a preliminary injunction—reinstatement and a prohibition against further retaliation pending the outcome of state administrative proceedings before the CCHRO. Judge Zampano denied the application for a preliminary injunction primarily on the ground that the plaintiff had failed to make a sufficient showing of irreparable injury. Having rejected the only request for relief, he then dismissed the complaint.

The appeal has been complicated by an ambiguity concerning the nature of the complaint. What is not clear

is whether the plaintiff is seeking a traditional preliminary injunction, *i.e.*, relief pending a judicial trial on the merits, or a final injunction of limited duration, *i.e.*, relief pending the state administrative proceedings, or perhaps both. We previously encountered an ambiguity of this sort in *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980), where a plaintiff sought and obtained from a district court an injunction (labeled "preliminary") to maintain the status quo pending an arbitration. We viewed that injunction as a final injunction of limited duration, since the plaintiff had secured all of the relief sought in its complaint. Holt's case is more complicated for two reasons: the injunction, whatever its nature, was denied, and the claim for relief is based on both Title VII and section 1981.

When a party seeks an injunction of limited duration, pending an outcome before another forum, it is arguable that the party is entitled first to seek a preliminary injunction, and then, if successful, to return to court for a plenary hearing on a "final" injunction, albeit one of limited duration. However, the justification for affording two such opportunities for relief of limited duration is substantially less in a case like this where the plaintiff will have a full opportunity for plenary consideration of her claims on the merits in the District Court after the state administrative proceedings, if those proceedings conclude adversely to her. In these circumstances the relief sought pending the state proceedings is more properly viewed as a traditional preliminary injunction because it is preliminary to the District Court's ultimate adjudication of the case.

To the extent that the plaintiff's claim is based on Title VII, she is obliged to exhaust state administrative remedies, as she recognizes. An injunction pending state ad-

ministrative proceedings is available prior to such exhaustion, *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (2d Cir. 1982), but that is the only relief available prior to exhaustion.[1] However, her claim under section 1981 is not subject to an exhaustion requirement. *Gresham v. Chambers*, 501 F.2d 687, 690-91 (2d Cir. 1974). Therefore she is entitled promptly to pursue the merits of her section 1981 claim in the District Court, even though her request for a preliminary injunction is denied. Notwithstanding the opportunity promptly to seek final relief on her section 1981 claim, the plaintiff came to the District Court with a complaint that sought only a "preliminary injunction." (Complaint, ¶ 1 and prayer for relief). In these circumstances we will consider at this stage of the litigation only the propriety of the denial of the precise relief requested. Since, as will be seen, we conclude that the matter must be returned to the District Court for further consideration of the request for a preliminary injunction, plaintiff will have an opportunity to amend her complaint and pursue the merits of her section 1981 claim, if that is her preference.

Turning to the request for a preliminary injunction, we agree with the District Court that it had jurisdiction, *Sheehan v. Purolator Courier Corp.*, *supra*, and this jurisdiction permitted the District Court to consider plaintiff's request for reinstatement, a restoration of the *status quo ante, see National Ass'n of Letter Carriers v.*

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[1] This exhaustion requirement renders Holt's claim slightly different from a claim for a traditional preliminary injunction because the plaintiff is not free, after denial of preliminary relief, promptly to pursue a plenary trial on the merits of her Title VII claim; instead the plaintiff must exhaust state administrative remedies and then obtain a right to sue letter from the EEOC. We do not think this delay in the opportunity for plenary judicial consideration of the merits alters the "preliminary" nature of the relief sought.

Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971); *Westchester Lodge 2186 v. Railway Express Agency*, 329 F.2d 748, 752 (2d Cir. 1964).

With respect to the merits of the injunction request, plaintiff urges us to hold that her affidavits and what she alleges to be fatal inconsistencies in CGI's affidavits mandate a conclusion that she has established a probability of success on the merits. If Judge Zampano has come to the conclusion, based on the record before him, that a probability of success has not been shown, we would be reluctant to find that he has abused his discretion in so concluding. However, we are left with some uncertainty as to his ruling on this score. Judge Zampano stated that "the plaintiff has not made a satisfactory showing of either likelihood of success or, most importantly, of irreparable harm," 542 F. Supp. at 17. He then observed that the "conflicting 'paper' proffers of proof do not provide an adequate evidentiary record upon which the Court can determine *whether* the plaintiff will likely prevail on the merits," *id.* at 17-18 (emphasis added), which could mean either that the issue was left unresolved or that the plaintiff had not met her burden of proof. He ultimately concluded, "What is *clear*, however, is that the plaintiff has failed to make the requisite showing of irreparable harm," *id.* at 18 (emphasis added). Since we conclude that this core ruling on irreparable injury warrants further consideration by the District Court, we prefer not to assess the probability of success on the merits at this stage and instead permit the District Judge to clarify his ruling on this point, in the event that, upon remand, he should conclude that irreparable injury warranting a preliminary injunction has been shown.[2]

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[2] Holt contends on appeal that she got the impression from a pre-hearing conference that the District Judge would inform the parties if

With respect to irreparable injury, an absolute requirement for a preliminary injunction, *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976), we agree with Judge Zampano that the requisite irreparable harm is not established in employee discharge cases by financial distress or inability to find other employment, unless truly extraordinary circumstances are shown. *Sampson v. Murray*, 415 U.S. 61, 91-92 & n.68 (1974); *EEOC v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). However, the claim in this case is not simply that an employee has been discharged and thereby has suffered injuries normally compensable by money. In addition, the plaintiff asserts that the discharge was in retaliation for her prior claim of a Title VII violation by her employer. A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury.

We do not, however, accept the EEOC's suggestion that there is irreparable injury sufficient to warrant a preliminary injunction in every retaliation case—a view that has been rejected by the Sixth Circuit even when the EEOC

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he concluded that he needed additional evidence in order to determine probability of success on the merits. We need not determine whether the plaintiff had a justifiable basis for this impression. Upon remand the plaintiff will have an opportunity to make a proffer of whatever additional evidence she has to present on the issue of probability of success, and the District Judge can then decide whether he wishes to reopen the record. Normally a party that elects to gamble on a "battle of affidavits" must live by that choice, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204-05 (2d Cir. 1970); *Dopp v. Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972). Whether any colloquy between the Court and the parties occurred that warrants a relaxation of that rule can best be determined by Judge Zampano upon remand.

was plaintiff and there was testimony that five employees would be "chilled" in testifying in plaintiff's favor. *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981).[3] In sustaining jurisdiction in *Sheehan v. Purolator Courier Corp., supra*, 676 F.2d at 887, we explicitly stated that we did "not alter the traditional showing that a party must make in order to persuade the court that injunctive relief is appropriate." This hardly contemplated a presumption of irreparable injury in every action by a plaintiff alleging a retaliatory discharge.

We do not doubt that the risk of weakened enforcement of Title VII, both in the instant case and in general, is a factor properly to be weighed by a district court in assessing irreparable injury. Judge Zampano may have implicitly concluded that this factor did not suffice to show irreparable injury in this case, but due regard for the enforcement of Title VII prompts us to return the matter to the District Judge so that he may explicitly determine whether the risk of irreparable damage arising from the consequences of what may have been a retaliatory discharge suffices, in the circumstances of this case, to satisfy the irreparable damage requirement for a preliminary injunction.

Holt also requests that we preclude the District Judge from giving any weight, as he did, 542 F. Supp. at 18, to the fact that considerable hostility has arisen between the plaintiff and her former colleagues in the legal department of CGI and that reinstatement pending the resolu-

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3 Although *EEOC v. Pacific Press Publishing Ass'n*, 535 F.2d 1182, 1187 (9th Cir. 1976), indicated that a *per se* rule of sufficient irreparable injury would apply in a case brought by the EEOC, it made clear that no such rule should exist when an individual sought relief. In *Smallwood v. National Car Co.*, 583 F.2d 419 (9th Cir. 1978), which used presumption of irreparable injury language, retaliation had been found after a trial.

tion of this dispute may precipitate a breach of confidences or a conflict of interest. While we think that reinstatement, if otherwise warranted, could be accomplished on a basis that minimized these risks, we are not prepared to hold that at a preliminary stage of litigation, a district judge is precluded from according such considerations any weight at all. Such a view would be inconsistent with the traditional discretion accorded a district judge in deciding whether to grant or deny a preliminary injunction. *See, e.g., Brown v. Chote*, 411 U.S. 452, 457 (1973); *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 441 (2d Cir. 1977). Indeed, a special damage remedy has been held to be preferable to reinstatement even as a final remedy in a retaliatory discharge case, *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977). Our summary affirmance in *Kallir*, including the cross-appeal challenging the denial of reinstatement, is not a precedent of this Circuit, *see* 2d Cir. R. 0.23, and we prefer to defer until the conclusion of this litigation any ruling on the factors that might permissibly warrant denial of reinstatement as a remedy for a plaintiff who prevails at trial.

Accordingly, we reverse the judgment denying the preliminary injunction and dismissing the complaint and remand for further consideration of the preliminary injunction consistent with this opinion and for further proceedings with respect to the section 1981 claim in the event that the plaintiff amends her complaint to pursue that claim beyond the request for a preliminary injunction.[4] No costs.

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[4] The plaintiff asks us to reverse the District Court's order denying her motion for disqualification of Skadden, Arps, Meagher & Flom to

FRIENDLY, *Circuit Judge*, concurring in the result:

I see no sufficient reason for requiring Judge Zampano to give further consideration to his denial of a temporary injunction, particularly when action by the CCHRO on the complaints that Ms. Holt filed in the fall of 1981 cannot be far off. Still I do not dissent to a remand for that purpose on the understanding, which I have, that we are leaving him entirely free to adhere to his previous decision if so advised. I see no reason to think that he failed to consider the possibility of a "chilling effect" which plaintiff alleged in ¶ 66 of her garrulous complaint and referred to in her lengthy statement before him (App. 519-20) and would have been obvious to anyone of the judge's experience and sensitivity in any event. I likewise understand that we are not precluding district judges in this circuit from denying reinstatement for the reasons developed by Judge Weinfeld in *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 926-27 (S.D.N.Y.1976), *aff'd mem.*, 559 F.2d 1203 (2 Cir.), *cert. denied*, 434 U.S. 920 (1977), which Judge Zampano followed here, especially in cases like this where the plaintiff has not yet established her case.

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represent the defendant in this case, a ruling available for review at this point once the appeal from the denial of the preliminary injunction has invoked our appellate jurisdiction. Our inspection of this motion shows that it is patently frivolous, not even setting forth a plausible basis for disqualification.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VERONICE A. HOLT,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. B-82-119
-against-	:	
	:	
THE CONTINENTAL GROUP, INC.,	:	
	:	
Defendant.	:	

RULING ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The plaintiff, Veronice A. Holt, is a black female attorney who was employed by the defendant, The Continental Group, Inc. ("CGI"), from October 18, 1976 to January 20, 1982. During this period of time, the plaintiff continually requested that the defendant rectify discrimination in her salary, benefits, and terms and conditions of employment. The defendant rejected her claims and, as evidence of its lack of discrimination, pointed to her substantial

raises in salary over the years from $35,000 to over $57,000, her promotions within CGI's Corporate Legal Department, and her increased duties and client contact.

On October 22, 1982, the plaintiff filed a complaint of race and sex discrimination in employment against CGI with the Connecticut Commission on Human Rights and Opportunities ("Commission"). Believing that this action induced CGI to engage in "retaliatory conduct," the plaintiff submitted another complaint to the Commission on December 10, 1981. These matters are presently pending decision on the merits.

On January 20, 1982, the plaintiff was discharged by CGI. In the letter of termination, CGI cited eight examples of plaintiff's disruptive behavior which "seriously hampered the efficient operation

of the Legal Department and the morale of other members of the Department."

In response, plaintiff commenced the instant lawsuit for injunctive relief, seeking reinstatement to her position as Securities Counsel for the defendant pending the outcome of the administrative proceedings before the Commission. Her application alleges that she was discharged in retaliation for filing complaints of employment discrimination against CGI and that, unless reinstated, she will suffer irreparable harm as a result of the substantial loss of income, the embarrassment of being wrongfully terminated, and the "chilling" effect the discharge will have on other employees who may wish to exercise their rights under Title VII of the Civil Rights Act of 1964. A hearing was held before this Court during which the parties submitted voluminous documentary evidence but called no witnesses.

It is well established that a preliminary injunction is an extraordinary remedy that should not be granted except upon a clear showing of 1) irreparable harm and 2) either a) a likelihood of success on the merits or b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party seeking the relief. Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); see also KMW International v. Chase Manhattan Bank, 606 F.2d 10, 14 (2d Cir. 1979); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 349 U.S. 999 (1969).

Preliminarily, there is a serious question whether this Court has jurisdiction to grant the relief requested because the plaintiff has not received a "right to sue" letter from the EEOC, a jurisdiction-

al prerequisite to a suit on the merits of a Title VII claim. See, e.g., General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 326 (1980); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). In the absence of a right to sue letter, the Court may grant interim injunctive relief to maintain the status quo, Sheehan v. Purolator Courier Corporation, ____ F.2d ____ (2d Cir. Aug, 10, 1981), but it is doubtful whether it can issue an injunction which materially alters the status quo and, in effect, grants relief that is only properly determinable after a trial on the merits. See Jerome v. Viviano Food Co., 489 F.2d 965 (6th Cir. 1974).

Even assuming jurisdiction, the plaintiff has not made a satisfactory showing of either likelihood of success or, most importantly, of irreparable harm.

On the merits, the parties have introduced a plethora of documents including affidavits, exhibits, company memoranda and data, and briefs. Some reflect that the plaintiff was a competent, personable, and conscientious attorney who served with skill and creativity. Other materials indicate that the plaintiff was a hostile, disruptive, and unprofessional member of the Legal Department who lacked the qualifications and ability to perform the duties entrusted to her by CGI. Under the fact situation in this case, these conflciting "paper" proffers of proof do not provide an adequate evidentiary record upon which the Court can determine whether the plaintiff will likely prevail on the merits.

What is clear, however, is that the plaintiff has failed to make the requisite showing of irreparable harm to justify injunctive relief. While it is true she

is presently unemployed, the plaintiff has failed to pursue other employment opportunities. Her moving papers are devoid of any allegation that she has exercised due diligence to obtain alternative employment or that her legal services are unacceptable to other employers because of the stigma of the loss of employment with CGI. In any event, financial distress or inability to find other employment, absent extraordinary circumstances, falls short of the type of irreparable injury which is a necessary predicate to the issuance of injunctive relief. Sampson v. Murray, 415 U.S. 61, 91-2 (1974); EEOC v. City of Janesville, 630 F.2d 1254, 1259 (7th Cir. 1980).

Finally, the Court is satisfied that reinstatement at this time would be inappropriate. The Legal Department consists of a small group of lawyers; trust, confidence and comaraderie are essential ingre-

dients of an effective working relationship. The record, not yet fully developed, already demonstrates an unusual degree of hostility and antagonism between the plaintiff and her former colleagues. If she is thrust back into their presence by court order during the course of the pending proceedings, the acrimony will surely be exacerbated and lead to even more misunderstandings, animosity, and distractions than existed while plaintiff was employed at CGI. Moreover, it is inevitable that the Legal Department will be involved in the preparation, strategy, and decision making with respect to the plaintiff's legal actions against CGI. If plaintiff is a working associate of the defense team acting on behalf of CGI, there would be a high probability of a serious conflict of interest and a likelihood of a breach of the confidences that must exist between client and counsel.

See e.g., St. John v. Employment Development Dept., 642 F.2d 273, 275 (9th Cir. 1981); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), aff'd mem., 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977).

Accordingly, the plaintiff's apppli-cation for injunctive relief is denied; the complaint is dismissed.

Dated at New Haven, Connecticut, this 15th day of April, 1983.

/s/ Robert C. Zampano
Robert C. Zampano
United States District Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

----------X

VERONICE A. HOLT,

Plaintiff-Appellant,

v.

No. 82-7542

THE CONTINENTAL GROUP, INC.,

Defendant-Appellee.

----------X

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by plaintiff-appellant, Veronice A. Holt, pro se, and counsel for the defendant-appellee, The Continental Group, inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that suggestions for rehearing in banc having been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

/s/ Victoria C. Dalton

by Deputy Clerk

United States District Court

District of Connecticut

VERONICE A. HOLT Plaintiff v. THE CONTINENTAL GROUP, INC. (A New York Corporation) Defendant	Civil Action No.____ Verified Complaint

1. Plaintiff, Veronice A. Holt, brings this action seeking preliminary injunctive relief restraining Defendant, The Continental Group, Inc., and its agents, from violating § 704(a) Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-3(a) and under The Civil Rights Acts of 1866 and 1870, 42 U.S.C. § 1981.

2. Plaintiff, Veronice A. Holt, is an individual, resident at #12A, 44 Strawberry Hill, Stamford CT.

3. Defendant, The Continental Group, Inc. is a New York Corporation, having its principal offices located at One Harbor Plaza, Stamford CT.

4. Defendant, The Continental Group, Inc. employs more than 25 persons and is subject to the provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000 et. seq.

5. Plaintiff was employed by Defendant, The Continental Group, Inc., during the period October 18, 1976 to January 21, 1982. During this period, Plaintiff has been employed in the following capacities:

a. Assistant Group Counsel, Continental Forest Industries - October, 1976 to Winter, 1977

b. Assistant General Counsel, Continental Forest

Industries - Winter, 1977 to May, 1980

c. Corporate Counsel, The Continental Group, Inc. - May, 1980 to December, 1980

d. Securities Counsel, The Continental Group, Inc. - December 1980 to January, 1982

6. Plaintiff is a black female.

7. During the period October, 1979 to January, 1982, when she was terminated, Plaintiff continually requested of the Defendant that it rectify discrimination in her salary, benefits and terms of employment.

8. During the period October, 1979 through October, 1981 Plaintiff addressed these complaints to the Defendant and its agents. Plaintiff addressed these complaints to Defendant and its agents because as a lawyer for the Defendant, she felt particularly constrained to make effort to resolve her claims of discrimination with-

out resort to the legal authorities entrusted with responsibility for resolution of such disputes.

9. On at least two occasions during this time period, October, 1979 to October, 1981, Defendant's General Counsel, Catherine A. Rein, informed Plaintiff of the severe consequences she would suffer if she filed charges of employment discrimination.

10. On October 22, 1981, having reached the conclusion that the Defendant would not rectify its discriminatory practices with respect to her and other persons similarly situated, except through the intervention of the proper legal authorities, Plaintiff filed a charge of employment discrimination with the State of Connecticut Commission on Human Rights and Opportunities. Plaintiff also provided the Commission on Human Rights and Opportunities with certain documents in support of

her allegations. (Copies of which are attached as Exhibit A.)

11. At all times prior to the filing of her charge of employment discrimination, Plaintiff had received an outstanding performance rating from her superiors, Defendant's agents.

12. In her last two personnel announcements, May, 1980 and December, 1981, respectively, Plaintiff's immediate superior, S. Bermas, Associate General Counsel, The Continental Group, Inc., cited her for her professionalism and creativity. (Excerpts from Plaintiff's personnel file are attached as Exhibit B.)

13. In March of 1981, Plaintiff received an award as an outstanding achiever from the Harlem YMCA, based upon Defendant having nominated her for such award. In spring of 1978, Plaintiff received a BRAVO award from the Greenwich YWCA, also based

upon Defendant having nominated her for such award.

14. Subsequent to the filing of the charge of employment discrimination, Defendant commenced a plan of retaliatory conduct.

15. On December 10, 1981, Plaintiff filed an additional complaint with the Connecticut Commission on Human Rights and Opportunities alleging that Defendant had engaged in retaliatory practices. One of the allegations of the additional complaint was that Defendant had given her an unfair performance evaluation which included false statements. (A copy of which is attached as Exhibit C.)

16. On January 8, 1982, Plaintiff provided to Defendant's General Counsel a copy of a draft of her response to the performance review. (A copy is attached as Exhibit D.

17. Plaintiff provided a copy of the response to the performance review to Defendant's General Counsel in order to afford her an opportunity to review the document for a determination as to whether any items were considered privileged prior to filing the document with the Commission on Human Rights and Opportunities.

18. Defendant's General Counsel did not, and has not, responded to the Plaintiff's request for review.

19. On January 8, 1982, Plaintiff, believing that the continuous harrassment she was subjected to by her immediate superiors, S. Bermas, Associate General Counsel, and C.A. Rein, General Counsel, was not authorized by the Defendant, filed a written complaint with the Defendant's personnel department. (A copy of which is attached as Exhibit E.)

20. Plaintiff's complaint to the personnel department primariliy concerned

the reassignment of functions which she had previously been responsible for in either a direct or supervisory capacity to other attorneys in the legal department without her involvement.

21. On January 11, 12, and 13, 1982, Plaintiff spoke with Defendant's Director of Personnel, James Wilson, whom she was informed by Mr. Bermas was responsible for handling her complaint.

22. At the conclusion of these discussions Plaintiff was instructed by Mr. Wilson to continue her job functions and that he had spoken to Plaintiff's superior S. Bermas concerning his conduct.

23. Also on January 11, 1982, Plaintiff notified Defendant's agents, Steve Bermas and James Wilson that as a result of the continual harrassment, she had developed a very painful facial stress condition.

24. Plaintiff had received a complete physical examination from Defendant's physician, Dr. Markely, in December, 1980, and was in good condition with no stress related illnesses.

25. Despite this condition, Plaintiff continued to perform all of the functions of her job which were not assigned to others.

26. Plaintiff also continued to do non-routine functions such as the drafting of a set of securities laws memorandum for use by the Defendant's lawyers and a self initiated research project on reevaluation of the Defendant's Dividend Reinvestment Plan in light of current trends.

27. Plaintiff was also requested by Defendant's Forest Industries group to assist them in winding up certain problems which had arisen with respect to the tax free incorporation of Continental Forest Industries, Inc.

28. These problems with respect to the tax free incorporation arose in part because an inexperienced attorney with no prior tax or corporate formation experience was assigned responsibility for the project without Plaintiff's supervision.

29. On the evening of January 15, 1982, Plaintiff returned to her home after work to discover that it had been unlawfully entered by person(s) unknown, but that nothing of value was removed. Plaintiff's windows, which are accessible from a balcony beneath the roof, were unlocked.

30. Plaintiff notified both the local police and the Federal Bureau of Investigation of the break in and that she was concerned for her personal safety.

31. On the morning of January 16, 1982, Plaintiff, in need of a rest, left Stamford, Connecticut and went to Washington, D.C., to visit her sister.

32. On Monday, January 18, 1982, Plaintiff called Defendant's offices and reported that she would need a few days leave of absence.

33. On Thursday, January 21, 1982, Plaintiff again called her office and spoke with her immediate superior, Steve Bermas. Plaintiff was told that she was terminated.

34. Defendant sent Plaintiff a letter stating the reasons for her termination. (A copy of which is attached as Exhibit F.)

35. Plaintiff was summarily terminated without prior oral notice from Defendant and its agents.

36. Plaintiff was summarily terminated without prior written notice from Defendant and its agents.

37. Plaintiff sent a mailgram to Defendant's Chairman and Chief Executive Officer, S. Bruce Smart, Jr. requesting confirmation of whether she had been termi-

nated. (A copy of which is attached as Exhibit G.)

38. By letter dated January 29, 1982, Defendant's agent, Catherine A. Rein, Vice President and General Counsel, and Steve Bermas's immediate superior, confirmed Plaintiff's termination. (A copy of which is attached as Exhibit H.)

39. On January 29, 1982, Plaintiff sent to Defendant's agents, Bermas, Braye, Rein, Smart, and Wilson, a written response to the stated reasons for her termination. (A copy of which is attached as Exhibit I.)

40. Defendant did not respond to Plaintiff's letter.

41. During the five year period of Plaintiff's employment, Defendant has never summarily terminated a lawyer employed by it in its General Counsel's office.

42. By letter dated February 2, 1982, Defendant's agent, James Braye informed Plaintiff that her medical benefits would

be terminated effective 30 days from the date of her termination, January 21, 1982. (A copy of which is attached a Exhibit J.)

43. At no time prior to her termination did Plaintiff submit her grievances to anyone other than the properly authorized agencies of the state and federal governments.

44. On or about January 11, 1982, Plaintiff received a telephone call from an employee of the Defendant stating that a member of the staff of the Advocate (a newspaper) was interested in discussing equal employment opportunity problems in the Stamford area with the Plaintiff. Plaintiff declined to meet with the Advocate representative.

45. Employment with Defendant was Plaintiff's single source of income.

46. Plaintiff's reputation as a lawyer has been and continues to be irreparably injured as a result of Defendant's

wrongful summary termination of her employment.

47. In light of Defendant having summarily dismissed Plaintiff for cause, the likelihood that Plaintiff will be able to obtain similar employment, as the primary financial lawyer for a Fortune 100 corporation is insubstantial.

48. Plaintiff has a legal obligation to attempt to mitigate her damages.

49. Reinstatement of Plaintiff is the best way to mitigate her damages.

50. When Plaintiff was summarily terminated, she received no severance pay. In fact Defendant, having accidently paid her salary through the end of the month of January, subtracted the remaining nine days of salary from other monies owed to Plaintiff.

51. At all time prior to Plaintiff's termination, Defendant had not responded to either of Plaintiff's charges of employment

discrimination filed with the Commission on Human Rights and Opportunities.

52. Defendant had obtained extensions of time for filing responses with the Commission on Human Rights and Opportunities by stating that it needed additional time to gather information.

53. Defendant retained the services of one of the nation's largest law firms, Skadden, Arps, Slate, Meagher and Flom (Skadden, Arps) to represent it with respect to Plaintiff's complaints filed with the Commission on Human Rights and Opportunities.

54. Skadden, Arps has a nationally recognized reputation for its speed and efficacy in litigation.

55. On or before February 3, 1982, Defendant submitted a partial response to the Commission on Human Rights and Opportunities.

56. Defendant's response consisted solely of it and its agents statements regarding the charges of discrimination.

57. Defendant did not submit its internal records requested by the Commission on Human Rights and Opportunities.

58. Defendant, The Continental Group, Inc., is subject to the reporting requirements of the Securities Exchange Act of 1934 ('34 Act).

59. Pursuant to the various rules and regulations promulgated by the Securities Exchange Commission pursuant to the '34 Act, Defendant is required to disclose material contingent liabilities with respect to pending or threatened litigation.

60. According to Defendant's own records, Defendant's contingent liability for class recovery in a case such as the one filed by Plaintiff may exceed $23,000,000 per year for which damages are

accessible. (A copy of which is attached as Exhibit K.)

61. Defendant must file its Annual Report on Form 10-K with the Securities Exchange Commission on or before March 31, 1982.

62. If Defendant's counsel, Skadden, Arps opines that Plaintiff is not likely to prevail on the merits of her complaints filed with the Commission on Human Rights and Opportunities, Defendant is not required to disclose the existence of Plaintiff's claims as a material contingent liability.

63. The termination of Plaintiff for cause is a basis upon which Defendant's counsel could opine that she has little likelihood for success on the merits of her complaints filed with the Commission on Human Rights and Opportunities.

64. Plaintiff believes that she was terminated in retaliation for filing

charges of employment discrimination with the Commission on Human Rights and Opportunities.

65. If this Court does not restrain Defendant, Defendant will have effectively mooted Plaintiff's claims with respect to discriminatory failure to promote her by eliminating her from its work force.

66. Further, unless this Court restrains the Defendant from summarily terminating Plaintiff's employment subsequent to the filing of answered charges of employment discrimination, Defendant will have succeeded in creating a "chilling effect" on the exercise of their legal rights by all persons protected by Title VII of the Civil Rights Act of 1964 and the Civil Rights Acts of 1866 and 1970, who are employed by the Defendant.

WHEREFORE, Plaintiff prays that after hearing had hereon, this Court issue a preliminary injunction:

1. Requiring the Defendant, The Continental Group, Inc., and its agents, to reinstate her to her position as Securities Counsel for the The Continental Group, Inc. immediately;
2. Requiring the Defendant, The Continental Group, Inc., and its agents, to maintain Plaintiff in her position as Securities Counsel pending the outcome of administrative proceedings with respect to Plaintiff's charges of employment discrimination filed with the Connecticut Commission on Human Rights and Opportunities;
3. Restraining the Defendant, The Continental Group, Inc., and its agents, from any further acts of re-

taliation or intimidation with respect to Plaintiff; and

4. Such other and further relief, general and special, as the Court deems just and proper.

/s/ Veronice A. Holt
Veronice A. Holt
#12 A 44 Strawberry Hill
Stamford, Connecticut 06902
(203) 327-5334

Verification

I, Veronice A. Holt, having first been deposed, do hereby state under oath that I have read the foregoing and upon information and belief do state that the same is accurate and true.

/s/ Veronice A. Holt
Veronice A. Holt

Sworn to and subscribed before me on this day of 16th February, 1982.

/s/ Notary Public
Notary Public

United States District Court

District of Connecticut

VERONICE A. HOLT, Plaintiff	Civil Action No._____
v.	Motion for Preliminary Injunction
THE CONTINENTAL GROUP, INC., (A New York Corporation) Defendant	

Plaintiff moves this Court issue a preliminary injunction to the Defendant, The Continental Group, Inc., its agents, employees, and all persons in active concert and participation with it:

1. Requiring the Defendant, The Continental Group, Inc., and its agents, to reinstate her to her position as Securities Counsel for The Continental Group, Inc., immediately;

2. Requiring the Defendant, The Con-

tinental Group, Inc., and its agents to maintain Plaintiff in her position as Securities Counsel pending the outcome of administrative proceedings with respect to Plaintiff's charges of employment discrimination filed with the Connecticut Commission on Human Rights and Opportunities;

3. Restraining the Defendant, The Continental Group, Inc., its agents, employees, and all persons in active concert and participation with it from further acts of retaliation or intimidation with respect to Plaintiff; and

4. Such other and further relief, general and special, as the Court deems just and proper.

Plaintiff moves this Court for a preliminary injunction pursuant to Rule 65 of

the Federal Rules of Civil Procedure upon the grounds that:

1. Unless restrained by this Court, Defendant will continue to violate §704(a) Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-3(a) and the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §1981;

2. Failure to so restrain the Defendant will result in irreparable injury, loss and damage to the Plaintiff in that:

a. Plaintiff's professional reputation has been, and will continue to be, irreparably injured;

b. Plaintiff's employment with the Defendant is her single source of income;

c. Effective February 20, 1982, Defendant will terminate Plaintiff's medical and hospitalization benefits;

d. Such other injury, loss and damage to the Plaintiff, as more particularly appears in Plaintiff's Verified Complaint.

3. Failure to restrain the Defendant from summarily terminating Plaintiff's employment subsequent to the filing of unanswered charges of employment discrimination will result in Defendant having effectively demonstrated to all of its employees protected by Title VII of The Civil Rights Act of 1964 and The Civil Rights Acts of 1866 and 1870 that it has the power to moot their claims without notice and an opportunity to

be heard, the fundamental cornerstones of due process, and the American judicial system, thereby producing a "chilling effect" on the exercise of their statutory rights;

4. The issuance of a preliminary injunction herein will not cause undue convenience or loss to Defendant, but will prevent irreparable injury to Plaintiff; and

5. The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to Defendant, but will remove the chilling effect that Defendant has created with respect to the exercise of their statutory rights by Defendant's employees.

This Motion for Preliminary Injunction is based upon all of the files, re-

cords and proceedings herein, including the Verified Complaint and the Exhibits attached thereto.

/s/ Veronice A. Holt
Veronice A. Holt
#12 A 44 Strawberry Hill
Stamford, Connecticut
06902
(203) 327-5334

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VERONICE A. HOLT, ESQ.
Pro Se

#12A 44 Strawberry Hill
Stamford CT 06902
(203) 327-5334

QUESTION PRESENTED

Whether in an action by a private paintiff, who is a real party in interest, *City of Los Angeles v. Lyons,* U.S. , 103 S. Ct. 1660 (1983), a case upholding the traditional notion that federal courts should exercise restraint in interfering with the police function, a function that under our system of federalism is primarily reserved to the state governments, should be a relevant consideration in determining whether the plaintiff has standing to maintain the action.

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OTHER

REASONS FOR DENYING THE WRIT

1. Continental's argument fails to recognize the underlying premise in *Lyons* that the delicate balance between federal and state powers prohibited the granting of *any* injunctive relief on behalf of Lyons, whether such relief be in the nature of a request for a preliminary or permanent injunction.

> "We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a *proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers* engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate. *(Citations admitted)* ... In exercising their equitable powers federal courts must recognize "the special delicacy of the adjustment to be preserved between federal equitable power and State adsministration of its own laws." *City of Los Angeles v Lyons* 103 S.C. 1660, 1670. (198) (Empahsis added)

This case does not invlove questions of federalism. It involves soley questions concerning enforcement of private rights pursuant to a statutory scheme expressly committing resolution of problems of employment discrimination to the federal courts. Holt is not asking this Court to declare a state statute or practice illegal. Continental's efforts to compare *Lyon's* and Holt is simply an effort to confuse the legal issues of this case by glibly citing precedents without reference to the underlying legal reasoning. Moreover, Continental's argument is based upon the incorrect assumption that *Lyons* changed law of standing. *Lyons* merely reiterated

principles well established in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Rizzo v. Goode* 423 U.S. 149 (1973). Continental, never having raised the question of standing in the lower courts, would have us believe that the Court of Appeals for the Second Circuit created grievous error by failing to consider a new precedent. This assertion that *Lyons*, established a new legal precedent runs afoul of the majority's clear statement to the contrary in the opinion:

> "No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. 103 S. Ct. 1667

II. Holt, as the "real party in interest" in a private action which does not raise constitutional questions, has standing.

Although Continental's argument is rather obtuse, the essential core of its arugment appears to be that Holt lacks standing because the Court of Appeals held that the district court should consider factors other than financial harm to Holt in determining whether the preliminary injunction should issue:

> "However, the claim in this case is not simply that an employee has been discharged and thereby has suffered injuries normally compensable by money. In addition, the plaintiff (Holt) asserts that the discharge was in retaliation for her prior claim of a Title II violation by her employer. A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the

> plaintiff in her effort *to protect her own rights.* These risks may be found to constitute irreparable injury." ***Holt v. The Continental Group,*** 708 F.2d 87, 91 (A-7) (Emphasis added)

In essence, Continental argues, with the utmost legal absurdity, that because the Court of Appeals held that the District Court on remand should consider whether terminating Holt might deter other employees from protecting their rights or assisting her in the prosecution of her charge, Holt is without standing to pursue injucntive relief for her own benefit.

A. Continental's assertion that Holt lacks standing is based upon a misaprehension of the concept of standing.

As a general rule, questions of standing arise only in actions against governmental entities:

> "Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to judicial determination. Both in its flowering and subsequent withering, this concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merits of the claim advanced, has been largely a creture of twentieth century decisions of the federal courts. More important, *it has been very much tied to litigation asserting the illegality of governmental action* whether the assertion has been that executive or administrative action is beyond the limits of statutory authorization or has been that a statutory authorization has exceeded constitutional limits. Claims of private wrongdoing ordinarily are asserted by persons obviously having an enforceable interest, if anyone has; such problems as arise commonly are handled in terms of defining private causes of action or of identifying the ***real party in interest.*** ***Moore's Federal Practice Section 3531.***

(Emphasis added)

The concept of standing is firmly rooted in the notion that courts should not act as a superlegislature. Federal courts should refrain from determining constitutional questions *unless* determination of the constitutional issue is critical to determining an actual case or controversy which cannot be adjudicated without resolution of constitutional questions. The essence of standing is that it is the door to judicial review. At the very inception of our judicial system, Chief Justice Marshall recognized that while courts must inherently, have the power to determine the constitutionality of laws passed by the legislative and executive branches, they must only exercise that power of judicial review in actual cases or controversies where decision of the constitutional issue is essential to resolution of the dispute before them. See *Marbury v. Madison* 1 Cranch 137, 2 L.Ed. 60.

The modern development of the concept of standing is primarily traced through three cases: *Frothingham v. Mellon*, 262 U.S. 447 (1923), *Baker v. Carr*, 369 U.S.186 (1962) and *Flast v. Cohen*, 392 U.S. 83 (1968). These cases all address the question of standing to seek equitable relief against a governmental entity as a private attorney general asserting the unconstitutionality of governmental action. Taken together, they stand for the proposition that the equitable jurisdiction of the federal courts does extend to cases and controversies brought by private persons who assert governmental deprivation of constitutionally guaranteed private

rights. Mrs. Frothingham, who asserted the state's interest in its legislative perogative lacked standing. On the other hand, the plaintiffs in *Baker* and *Flast* who asserted violation of their Fourteenth and First Amendment rights, respectively, had standing. Ultimately the question of standing is one of the status of the party seeking judical review of governmental action.

B. Holt meets the test of standing

Subsequent to *Baker* and *Flast*, this Court in *Association of Data Processing Service Organizations v. Camp* 397 U.S. 150 (1970) set forth a threefold test for determining standing:

1. Does the plaintiff allege that the challenged action has caused him "injury in fact", economic or otherwise?

2. Is the interest which the plaintiff seeks to protect "arguably" within the "zone of interest which the plaintiff seeks to protect?

3. Has judicial review been precluded?

Holt clearly meets this test. She has been injured in fact. The interest she seeks to protect, employment is clearly within the "zone of interest" of Title VII. Judicial review has not been precluded.

a. Injury In Fact

Holt has suffered "economic injury in fact". Her employment was terminated and continues to be terminated. As detailed in her affidavit in support of her motion in *forma pauperis* filed in this Court, not only is Holt threatened with econo-

mic injury--she is rapidly approaching economic ruin. Holt is "otherwise injured in fact". She is injured by the deprivation of her statutory right to be free from retaliation in the pursuit of her Title VII charges. She is injured by intimidation in the prosecution of her charges. As Holt pointed out in her brief to the Second Circuit, one of the reasons proffered in support of Holt's termination was her written response to her performance review given subsequent to the filing of the original discrimination charges. Continental considered the mere confidential writing by Holt of her response to her performance review to be a breach of its "trust and confidence" meriting termination "regardless of its accuracy". In fact, Continental deemed its trust and confidence to be breach even though Holt, mindful of confidentiality considerations afforded it a prior opportunity to comment on the document *prior* to its submission to the State of Connecticut Commission on Human Rights and Opportunities. When an employer charged with discrimination asserts that the mere confidential writing of statements regarding discriminatory conduct is grounds for termination, *how can Holt, or any other charging party, having herself been terminated for asserting her rights "regardless of...accuracy", ask her former co-workers to put aside their concerns for themselves, their careers, and their families to testify in her behalf knowing that their testimony would subject them to termination?*

Further, we need not speculate as to whether Holt has been "injured in fact" by the termination. In the nearly two years proceeding her termination, she has been unable to obtain employment in her field, notwithstanding the fact that she has excellent academic credentials and had, prior to the filing of the charges, never received less than an "outstanding" performance rating in her seven years employment with major industry.

"Blackballing" is a practice that occurs in secret and that no Title VII litigant will probably ever be able to prove; however, in the instant case it is the specific assertion of Holt in the record that on two occasions Continental's General Counsel specifically stated to her *prior* to the filing of her charges, that if she filed charges, it would "ruin her career". (App. 27, 32-33) Events subsequent to the filing of Holt's charges have surely proven this statement to be more than idle conversation.

Just as we need not speculate whether Holt's termination has resulted in "injury in fact", we need not speculate whether Continental *intended* Holt's termination to act as a barrier to the full and free investigation of her charges. Subsequent to the termination of Holt and the commencement of this action, William Kandel of Skadden Arps, Continental's Counsel in this matter, telephoned Holt to specifically inform her that she should have no furher contact with Continental's employees. (App. 469)

Defendant even sought to have the record in the District

Court sealed, and to have the courtroom closed to the public during the hearing. (App. 466) When an employer fires an employee with an exemplary record three months after the filing of her charges, tells the terminated employee to refrain from futher contact with other employees, and then attempts to impose a "blackout" on subsequent judicial proceedings, no explanation except a consciously planned effort to "chill the exercise" of the employee's rights is available to characterize the employer's conduct. Holt is not "speculating" that Continental intends to "chill the exercise" of her statutorily guaranteed rights, she is asking this Court to enjoin Continental's present, continuous and irreparable injury to the assertion of her rights caused by the termination of her employment.

Further in this regard, it should be noted that Continentals's assertion in its Brief in Opposition to Holt's Cross Petition at page 4 that "the First Amendment is in no way implicated or alledged in Holt's claim or in Continental's reasons for discharging her her.", is incorrect. At the hearing in the District Court, Holt specifically addresed her First Amendment concerns.

> "I would also point out that one of the underlying rationale in some of the cases granting preliminary injunctions is to the extent to which a termination during a Title VII proceeding will unfairly impinge upon the plaintiff's First Amendment Rights.
>
> In this particular case, *Plaintiff is concerned that there is some consideration on the part of the Defendant to impinge upon*

> *her first Amendment Rights.* Specifically, Plaintiff received a letter from the personnel manger of the Defendant corporation with respect to her savings plan.
>
> Plaintiff called the personnel manager to ask him about election of the savings plan. Subsequently, *Plaintiff received a telephone call from Defendant's counsel, instructing her that she should not have any communication with Defendant's employees except if she had those communications through him." (Emphasis added)* (App. 469)

Continental misrepresents Holt's position in order to assert that ***Elrod v. Burns*** 427 u.S. 347 (1976) is not applicable to the instant action because, it asserts, ***Elrod*** only concerns First Amendment freedoms, and no other forms of protected activity.

Exercising Title VII rights obviously requires speech, written or verbal. In "chilling the exercise" of Holt's Title VII rights, Continental inherently chills the exercise of activity protected by the First Amendment. Of course, Continental, a private "person", not a governmental entity, is not directly subject to the proscriptions of the First Amendment; however, the Civil Rights Acts of 1866 and 1870, 42 U.S.C. Section 1981 *et. seq.* (specifically pled by Holt A-22, 45 and 46) is applicable to private persons, ***Jones v. Alfred H. Mayer Co.*** 392 U.S. 409 (1968) including Continental.

Finally, in this case, there is uniquely conclusive evidence that Continental acted with intent to retaliate, to injure Holt in the assertion of her rights guaranteed by Title VII. Although proof of intent is not required to establish liabi-

lity under Title VII, there can be no doubt in this case that from the very moment Continental received notice of Holt's charges, it embarked upon a concerted plan to use unlawful means to defend against the charges.

Continetal's first act in response to the charges was to hired Skadden Arps in clear contravention of the Code of Professional Responsibility (which has been enacted into statute in both of the relevant jurisdictions, Connecticut and New York). Not only did Continental hire the law firm that was advising Holt in the daily performance of her job to defend against employment discrimination charges arisng out of that job, Continental hired Skadden Arps (and Skadden Aprs accepted the representation) *secretly*, without disclosure to Holt.

Now, at this late point in these proceedings, Continental realizes that secret retention of Skadden Arps makes its conduct indefensible. To cure this problem, it actually misstates the record below in it pleadings in this Court:

> "The record indicates that Holt's assertion of an attorney-witness ground for disqualification is based on a telephone conversation she had initiated with a Skadden, Arps lawyer months after being *notified* of the law firm's role as defense counsel in her action." Continental's Brief in Opposition to Holt's Cross-Petition at page 6. (Emphasis added)

Continental understandbly does not cite any reference to the record in support of this statement. There is absolutely no support in the record for this statement. Counsel has sewn

it of whole cloth to cover its blatant unethical and unlawful conduct. The *only* statements in the record concerning the retention of Skadden Arps are those of Holt who unequivocally states that her knowledge of Skadden Arps representation of Continental in the discrimination charges "was derived from supposition":

> "Skadden Arps was subsequently retained, *without disclosure* to Plaintiff (Holt), to represent Defendant/Respondent (Continental) in the discrimination charges. (Holt's) knowledge of Skadden Arps representation was *derived from supposition*. Specifically, she observed Mr. Kandel at the Stamford offices of (Continental) shortly after the receipt of her charge. As she had never observed Mr. Kandel's prior appearance at the Stamford offices, and knew that Mr. Kandel's primary area of practice was employment discrimination, she assumed that he had been retained to respond to the charges filed with the CHRC.
>
> On Friday November 13, 1982, when (Holt) was informed by Steve Bermas (Continental's Associate General Counsel and Holt's immediate superior) that the complaints filed with the CHRC had been received, she stated her *supposition*, and he confirmed it." (App. 616)

This statement by Holt is the only statement in the record concerning how Holt obtained knowledge of the Skadden Arps representation of Continental in the discrimination charges. More importantly, the Code of Professional Responsibility requires something substantially greater than *notification* of "differing interest".

> "DR 5-501 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent profes-

> sional judgment in behalf of a client will be or is likely to be affected by the acceptance of the proffered employment, *or if it would be likely to invovle him in representing differing interest*, except to the extent permitted under DR 5-105(C)
>
> * * *
>
> (C) In situations covered by DR 5-105 (A) and (B), a lawyer may represent mutltiple clients if it is obvious that he can adequately represent the interest of each and *if each consents to the representation after full disclosure* of the possible effect of such representation on the exercise of his independent professional judgement on behalf of each. (Emphasis Added)

Even with its effort to improve the facts with a statement unsupported in the record, Continental is not so bold as to say that it made any effort to actually comply with the clear requirement of the Code of Professional Responsibility, *disclosure and consent.*

The simple fact is that upon receipt of Holt's charges, Continental decided to use every means available, without regard to legality, to prevent the exercise of Holt's rights under Title VII, and it now has the ultimate audacity to come into the highest Court of the nation and assert a ***constitutional right to continue its unlawful conduct free from judicial scrutiny***, which right it is willing to support by misrepresentation of the record.

Holt has been injured in fact, economic and otherwise, and she continues to be so each and every day that the unlawful termination of her employment in retaliation for asserting her statutory rights is allowed to continue.

2. <u>The Zone of Interest</u>

The purpose of Title VII is provide a statutory gaurantee

against employment discrimination. In Section 704(a), Congress specifically legislated retaliation for filing employment discrimination charges to be a violation of the Act. The interests which Holt seeks to protect are precisely the interests guaranteed by the statute in question.

3. Preclusion of Judical Review

Generally, the question of preclusion of review as a grounds for denying standing focuses upon whether there is an express constitutional or statutory provision proscribing judicial review of a particular act of a governmental entity. Most often, preclusion is only an issue in cases involving questions of administrative procedure, as in ***Associated Data Processing Service Organizations***, supra.

Surely, in this case, there is no question of preclusion. In fact, the responsible governmental agency, The Equal Employment Opportunity Commission appeared as *Amicus Curiae* in the Court below to urge the granting of injunctions to stay retaliatory terminations.

C. Continental's argument fails to recognize that threshold considerations of standing are not present where the plaintiff is the real party in interest

Although as analyzed above, it is quite clear that Holt could meet the relevant test for determining standing, it is equally clear that considerations of standing are not present in this case. Questions of standing only arise where there is an issue as to whether the plaintiff has a "personal stake in

the outcome" *Baker*, supra at 204.

The standing cases, including *Lyons*, involve on the one hand, private plaintiffs seeking to enjoin future governmental conduct which they assert will improperly impinge upon some protected activity in which they intend to engage in the future, and on the other hand, a governmental defendant asserting either separation of powers or federalism as a defense. Determination of standing or lack of standing balances the right to obtain judical review of unconstitutional or unlawful conduct by the sovereign against the right of the sovereign to conduct the functions of government expressly committed to it under the constitution.

Thus in *Baker*, the State of Tennessee had a clear right to apportion its legislative districts, but plaintiffs had an equal right to have their vote equally counted. Likewise, in *Flast*, plaintiff, whose First Amendment rights were "arguably" abridged by the Congress's exercise of its power to "tax and spend" had standing.

In balancing bewteen the rights of citizens and the rights of governmental entities, the one area in which this Court has traditionally been most reluctant to use its equitable powers is in cases involving intrusion upon state exercise of its police power. *O'Shea*, *Rizzo*, and now *Lyons*, form a clear line of authority that stand for the proposition that standing to enjoin police conduct as uncon-stitutional exists only when:

1. The conduct challenged is clearly pursuant

to official policy.

2. The conduct challenged, if proven, would be clearly unconstitutional.

3. The threat of future unconstitutional activity by the police is substantial, and *the plaintiff is likely to be the target of that conduct.*

Thus, in *Lyons*, the majority clearly stated the basis upon which Lyons *would have* standing to seek the injunctive relief he requested.

> "In order to establish and actual controversey in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner. 104 S. Ct. at 1666 (Emphasis in original)

Thus, even in the area of state exercise of its police power where this Court has imposed a very exacting test of standing, it has not been willing to say that standing *per se* is unavailable to a class of plaintiffs.

More importantly, these cases are totally irrelevant to the case at bar. They have been set forth in detail soley for the purpose of throughly examining defendant's argument. Having looked at these cases it is clear that they provide no illumination on the case at bar in which the plaintiff, Holt, asserts a private right of action and defendant, Continental, is a public corporation, not a police department.

What is relevant here is that Holt is the real party in in-

terest in this litigation. Her suit is not to enjoin Continental from terminating other charging parties in the future--it is to enjoin her current termination.

This Court has not been called upon to determine whether in private actions between private citizens, the plaintiff has standing, probably because as ***Moore***, supra, observed "Claims of private wrongdoing ordinarily are asserted by persons *obviously* having an enforceable interest..."

This Court has been called upon in ***Trafficante v. Metropolitan Life Insurance Company*** 409 U.S. 205 (1972) to determine whether private plaintiffs, who were arguably not real parties in interest had standing to sue a private defendant for violation of the Civil Rights Act of 1968 prohibiting discrimination in housing. Plaintiffs, white citizens, had not been discriminated against. They asserted that defendant Metropolitan had injured them by its discriminatory housing policy by depriving them of the benefits of living in an integrated community. The District Court dismissed their action for lack of standing. This Court reversed. Under the relevant statute, suit could be brought by any person injured by a discriminatory housing practice. Plaintiffs claimed injury; therefore, they had standing.

In his concurring opinion, Justice White notes that absent the statute, he would have great difficulty finding that the "petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution." 409 U.S. 212; however,

because he would sustain the statute's extension of jurisdiction to "those in the position of the petitioners", he concurs in the determination that petitioners had standing.

The essential point not to be missed in *Trafficante* is that Congress can, within the limits of Article III extend standing to private citizens to litigate a public wrong even when they seek to litigate claims not tradionally recognized as personal injury.

Thus, not only does Holt have standing in her own right to seek injunctive relief for the injury to her, loss of her employment, she may assert injury to others whose rights may have been breached by the statutory violation. In its reasoning in *Trafficante*, this Court stated in support of its finding that petitioners, though not direct victims of discrimination, had standing:

> "Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, as the Solicitor General says, the complainants act not only on their own behalf but also as private attorneys general in vindicating a public policy that Congress considered to be of the highest priority.' The role of "private attorneys general" is not uncommon in modern legislative programs." 409 U.S. 211.

Likewise in Title VII litigation, this court has expressly recognized the role of private litigants in "vindicating congressional policy".

> "In addition to reposing ultimate authority

> in the federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigation and conciliation procedures...*In such cases the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.*" *Alexander v. Gardner-Denver Company*, 415 U.S. 36 44-45 (1974)

Just as the petitioners in *Trafficante* had standing pursuant to a statutory scheme to vindicate congressional policy against housing discrimination, Holt who is also the real party in interest has standing to vindicate congressional policy prohibiting retaliation for filing charges of employment discrimination. Of course, it is not really necessary to reach this issue since Holt is the real party in interest and her standing to assert harm to herself is "obvious".

D. Standing is an *aspect* of justiciabilitly, a limitation on federal judicial power. Continental having expressly *conceded* jurisdiction is now challenging an issue which it has already conceded.

> "The jurisdiction of federal courts is defined by Article III of the Constitution...the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies'...Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal government will not intrude into areas committed to the other branches of government. *Justiciability is the term of art employed to give expression to this dual*

limitation placed upon federal courts by the case and controversy doctrine.

Standing is an aspect of justiciability, and as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability...*The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated...In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Flast*, supra 392 U.S.at 94-95, 99 (Emphasis added)

In *Sampson v Murray*, 415 U.S. 61, this Court expressly recognized that District Court's have jurisdiction to entertain a request of a terminated employee for preliminary injunctive relief. It so held despite the fact that Sampson did involve considerations of separation of power, thereby invoking one of the traditional grounds for denial of standing. The logical absurdity of Continental's position is well illustrated by the fact that on the one hand it relies on *Sampson* to establish that the financial harm to Holt can not be recognized as "irreparable injury" supporting the issusance of an injunction, while at the same time ignoring the express statement in Sampson that the District Court had jurisdiction.

"We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief *in this case* cannot be sustained." 415 U.S. 63. (Emphasis Added)

Despite the clarity of this Court's statement that it had jurisdiction in ***Sampson***, Continental now asserts the exact opposite, that District Court's do not have jurisdiction to entertain employee suits for preliminary injunctive relief, because termination of employment cannot result in irreparable injury.

Continental arrives at this conclusion without any statement of the legal logic implicit in this result. First, holding that Holt does not have standing and therefore, the District Court does not have jurisdiction, would reverse this Court's specific determination of jurisdiction in ***Sampson***, as well as ***Elrod v Burns***, supra.

Secondly, it would required that lack of "extraordinary circumstances", the ***Sampson*** standard, be conclusively presumed as a matter of law, rather than determined as matter of proof. A determination that Holt lacks standing requires that this Court determine as a matter of law, rather than fact, that Holt, or for that matter any Title VII claimant who is a victim of retaliatory termination, *could not* have been irreparably injured by a summary termination.

Finally, Continental is asking that this Court hold that the irreparable injury resulting from a retaliatory termination is *per se* speculative. Continental is not asking this Court to hold that Holt has failed to demonstrate irreparable injury resulting from her termination: It is asking this Court to hold, as a matter of law, without regard to the facts of the case, that Holt could not have been, and cannot be, ir-

reparably injured by summary retaliatory termination.

The fallacy of Continental's position appears to be rooted in a failure to distinquish the difference bewteen jurisdiction to entertain a complaint and judicial determination whether under the facts of the case, the relief requested *should be* granted.

It is not suprising that Continental wishes to employ a jurisdictional bar to avoid determination of the merits (Holt's likelihood of success and injury in fact). Continental's conduct in this case was so egregious that, since the submission of Holt's proof in the District Court, Continental has declined all invitations to argue the likelihood of success on the merits. In the District Court, following Holt's presentation of the record supporting her likelihood of success on the merits, Continental declined to argue the question of likelihood of success on the merits. (App. 572)

In the Court of Appeals, Continental declined to make any argument whatsoever in support of its termination of Holt. It merely submitted itself to questioning by the Court. More importantly, in response to questions raised by the panel, Continental's attorney stated that ***Continental "conceded" that the District Court had jurisdiction over Holt's case under 42 U.S.C. Section 1981.***

Since standing is a subset of jurisdiction, Continental having admitted jurisdiction in the Court of Appeals, now comes to this Court to seek reversal of a judicial deter-

mination of jurisdiction *which it has expressly conceded.*

Yes, Continental actually has the temerity to suggest that the Second Circuit was in error for failing to consider that Holt did not have standing, after it has already conceded the issue in open court.

Questions of jurisdiction address themselves singly to whether courts have the power under the constitution, and statutes properly enacted pursuant to it, to hear the plaintiff.

Since standing is a subset of jurisdiction, this Court's determination that it had jurisdiction in *Sampson*, necessarily included a determination that plaintiff, the terminated employee, had standing. The mere fact, however, that she had standing did not entitle her to the grant of the injunction. She had not presented any evidence to support a finding of irreparable injury and further, the right she sought to protect, assurance of due process in her termination, was viewed by the majority as de minimus when balanced against considerations of separation of power.

Holt, however, seeks to protect a very important right, the right to proceed under Title VII free from employer retaliation. Holt has been and continues to be irreparably injured in a case involving more than mere loss of employment. Holt has standing. The federal Court have jurisdiction.

CONCLUSION

This Court should deny Continental's Petition for Writ of

Certiorari, and grant the injunctive relief requested by Holt in her Cross-Petition. The requirement that a plaintiff have standing does not impose a barrier to relief in this case. Plaintiff, as the real party in interest, seeking to litigate a private right of action in a case that does not involve considerations of federalism or separation of powers, unquestionally has standing.

It should do so summarily. In light of the egregious conduct of Continental, it is obvious that Holt has a very high likelihood of success on the merits. Finally, Holt has obviously been irreparably harmed, and continues to be harmed. Holt has spent the last two years of her life living under a stigmatism arising from Continental's unlawful conduct. No future award of money damages can ever restore the two years of the prime of Holt's professional career development that she has lost. They are gone forever, irreparably lost. Holt continues to be ireparably injured each and every day that Holt's termination continues. Additionally, Holt is not suffering any ordinary financial harm. Holt is legally insolvent and lives every day under the real threat of bankruptcy. No court in equity could countenance the continuation of the inequities that have been visited upon Holt.

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Stamford, CT 06902

(203) 327-5334
Pro Se

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

PROOF OF SERVICE - AFFIDAVIT

I, Veronice Holt, Respondent, *pro se,* herein, hereby certify that on the 5th day of January, 1983, I deposited in the United States Post Office located at Stamford CT, with postage prepaid, in a duly addressed envelope, to Jeffrey Glekel, Counsel of Record for Petitioner, The Continental Group, Inc., a copy of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of appeal for the Second Circuit.

VERONICE A. HOLT, ESQ.
Pro Se
#12A 44 Strawberry Hill
Stamford CT 06902
(203) 327-5334

Subscribed and sworn to before me at Stamford Ct on this 4th day of January, 1984.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-~~561~~ 511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Veronice A. Holt, request leave to file the attached reponse to a petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Respondent did not request permission to proceed in forma pauperis in either the United States District Court or the United States Court of of Appeals for the Second Circuit. Respondent did request permission to proceed in forma

pauperis in her cross petition filed in this court, No. 83-5586.

Respondent's affidavit in support of this motion is attached hereto.

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Stamford CT 06902
(203) 327-5334

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Veronice A. Holt, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay costs of said case or to give security therefore; and that I sincerly believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you curently employed?

This matter arises out the termination of my employment in January, 1981. Since that time, with the exception of a four month period during which I was employed as a long-term substitute teacher, I have been unable to secure any full-time permanent employment. I currently work as a temporary secretary on the days when I am able to secure employmnet through various temporary agencies. If I am able to obtain employment for the entire week, I earn approximately $280 after deductions; however, because of the length of my unemployment, this amount is insufficient to meet my current obligations and as, further discussed below, I have substantial past due obligations, upon which suit by creditors is threatened.

During the month of December, 1983, I have also been employed as part time "Christmas-help" in a department store. This employment results in an income of approximately $80.00 per week.

I continue to seek full-time employment and will withdraw this request, if during the pendancy of these procedings, I become financially solvent.

2. Have you received within the past twelve months any

income from a business, profession or other form of self employment, or in the form of rent payment, interest, dividend or other source?

I own one share of stock in the Petitioner, The Continental Group, Inc., upon which I receive a quarterly dividend in the amount of $.65. I previously owned approximately ninety share of stock in that corporation, but they were sold in July and October of 1982 in order to meet financial obligations.

At the time of my termination, I had savings in the amount of approximately $8,000, in interest bearing accounts.

As a result of my termination, I forfieted approximately $5,000 in savings in an employer sponsored savings plan.

During the month of October, 1983, I earned $1,000 for a free-lance writing assignment. This amount was applied to the payment of my debts. I have not had any other form of self-employment during the past two years.

3. Do you own any cash checking or savings account?

The average current value of my cash accounts is approximately $150.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding

ordinary household furnishings and clothing)?

I own a condominium which is my primary place of residence, the purchase price of which was approximately $67,000 in 1978. There is a mortgage in the amount of $60,000 on the condominium, which is currently approximately $4,000 in arrears. I own an automobile which is approximately seven years old and fully paid for.

I also owe approximately $2,000 to Commercial Credit Corporation on a loan which is approximately ten months in arrears; $1,000 to American Express Company which is approximately twelve months in arrears; and $350 to Carte Blanche Corporation which is approximately twelve months in arrears.

5. List the persons who are dependent upon you for their support and state your relationship to these persons.

I am the only person who is dependent upon me for support.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

VERONICE A. HOLT, ESQ.
Pro Se

#12A 44 Strawberry Hill
Stamford CT 06902
(203) 327-5334

Subscribed and sworn before me this 4th day of January 1984

[illegible] JR
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1989

No. 83-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE CONTINENTAL GROUP, INC.,

Petitioner,

v.

VERONICE A. HOLT,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY

First. Respondent Veronice A. Holt ("Holt") asserts that she may base her standing to sue for injunctive relief solely on injury to third parties because the case or controversy requirement of Article III applies only to private plaintiffs seeking relief in federal court against the exercise of governmental power or when issues of federalism are implicated. (Brief in Opposition ("Br. Op.") at 1-5). She has cited no case which supports this remarkable proposition in the least. The case or controversy prerequisite to Article III jurisdiction has never been so limited; this Court has repeatedly required compliance with Article III standing requirements in cases involving only private parties. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10 (1972);* *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 272 (1941).

* *Trafficante*, cited by Holt as a case where a litigant was permitted to litigate the rights of third parties, held nothing of the kind. What the Court held was that a personal injury — the loss to plaintiffs of "important benefits of interracial association" — was sufficient injury to satisfy Article III. 409 U.S. at 209-10. Indeed, the Court predicated its holding upon the fact that "[i]ndividual injury or injury in fact to petitioners, the ingredient found missing in *Sierra Club* v. *Morton*, 405 U.S. 727, is alleged here." 409 U.S. at 209. Justice White, concurring, questioned whether absent the Civil Rights Act of 1968 the personal injury alleged by plaintiffs was sufficiently concrete to satisfy Article III. Plaintiffs did not even assert that they had standing by virtue of injury to third parties.

Moreover, Holt is incorrect in assuming that no considerations of federalism are involved in this case. Title VII unambiguously reflects Congress' intent that state agencies play an active role as guarantors of Title VII in the first instance. *See* 42 U.S.C. § 2000e-5(c). *Cf.* H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News 2137, 2146 (1972) ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases"). In fact, Holt sought the preliminary injunction at issue here pending state administrative review of her charges by the Connecticut Commission on Human Rights and Opportunities. To the extent that Article III standing requirements are ignored in favor of the rule adopted by the Second Circuit permitting an individual employee to seek injunctive relief on behalf of third parties, the initial focus of Title VII litigation seeking to resolve those "complicated issues involved in discrimination cases" would shift from state agencies to the federal courts — a result clearly not intended by Congress.

Second. Holt seems to argue, without citing any statutory provisions, legislative history or judicial authority, that Title VII provides her with standing to seek injunctive relief to vindicate injuries to third parties even absent injury to herself. (Br. Op. at 17-18) But even assuming *arguendo* this extremely dubious proposition that Congress could have, consistent with Article III, removed traditional limitations upon standing to the extent of authorizing Holt to litigate the "chilling effect" of her discharge on Continental's remaining employees (*see Havens Realty Corp.* v. *Coleman*, 455 U.S. at 372-73; *Warth* v. *Seldin*, 422 U.S. 490, 498-99, 501 (1975)), it has not done so either expressly or by implication. Indeed, it is clear that Congress intended to require employees bringing Title VII actions to establish irreparable injury to themselves in the manner that equity has traditionally required. *See* Petition for Certiorari at 7-8. Thus Holt lacks the "personal stake in the outcome" of any controversy which other employees might have with Continental that is required to justify exercise of a federal court's remedial powers in her behalf. *Warth* v. *Seldin*,

422 U.S. at 498-99. Any claim that other employees may suffer a "chilling effect" is one that *they* would have to allege, and cannot support standing for Holt's injunction action. *City of Los Angeles* v. *Lyons*, U.S. , 103 S.Ct. 1660, 1665-69 (1983).

Third. Holt argues that she must have standing because her discharge has allegedly resulted in injury to her. (Br. Op. at 5-12) She ignores the teaching of *Lyons*, however, that just because a plaintiff has alleged personal grievances sufficient to satisfy Article III, it does not follow that she also has standing to obtain relief to redress grievances of third parties. Continental neither contests nor has contested Holt's standing based on injury to her alleged in her complaint to seek injunctive relief. Holt did attempt to demonstrate irreparable injury to herself from her discharge, but, as the District Court found and the Court of Appeals affirmed, she failed to satisfy her burden. *Holt* v. *The Continental Group, Inc.*, 542 F. Supp. 16, 17-18 (D. Conn. 1982) (Appendix to Petition for Certiorari at A15-17); *Holt* v. *The Continental Group, Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983) (A6-9). But the fact that Holt had standing to litigate the question of whether she had been irreparably harmed does not give her standing to litigate the putative "chilling" of the rights of other employees any more than the fact that *Lyons* had alleged a cause of action for damages to redress the injury he had suffered gave him standing to vindicate the rights of third parties allegedly exposed to injury. *City of Los Angeles* v. *Lyons*, 103 S.Ct. at 1669.

Fourth. Holt asserts that "Continental never . . . raised the question of standing in the lower courts." (Br. Op. 2, 21-22). This is erroneous. In fact, Continental argued before the District Court in its Memorandum in Opposition to Plaintiff's Request for a Preliminary Injunction and in Support of Defendant's Motion to Dismiss, to Strike, and for a Protective Order (excerpt attached hereto as Supplementary Appendix A, at Supp. App. 2) that to the extent Holt alleged in her complaint that her discharge had a "chilling effect" on third parties, "Holt lacks standing to raise this claim." In response to Holt's argument before

the Court of Appeals that the "chilling effect" of her discharge fulfilled the irreparable harm requirement for a preliminary injunction, Continental argued in its Brief for Defendant-Appellee (excerpt attached hereto as Supplementary Appendix B, at Supp. App. 3) that the alleged "chilling effect" of Holt's discharge upon the rights of third parties could not establish the irreparable harm to her required for injunctive relief. In addition, since Continental was the appellee in the Second Circuit, it was not required to reassert every argument presented to and accepted by the District Court in order to avoid waiver.* Following the Second Circuit's decision, Continental petitioned unsuccessfully for rehearing on the basis of *Lyons* and its antecedents. (A20-21)**

CONCLUSION

For the foregoing reasons and for those stated in the Petition for Certiorari, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: January 12, 1984

Respectfully submitted,

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* It does not follow, of course, from the fact that on appeal Continental did not challenge the District Court's jurisdiction under 42 U.S.C. § 1981 to adjudicate Holt's claim of retaliatory discharge, that Continental thereby acknowledged Holt's standing to redress the alleged injuries of third parties.

** Moreover, Holt's standing to request relief is a question of subject matter jurisdiction that cannot be waived. *See University of California Regents* v. *Bakke*, 438 U.S. 265, 379, 380n.1 (1978) (White, J., concurring); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938); *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan Rwy. Co.* v. *Swan*, 111 U.S. 379, 382 (1884).

SUPPLEMENTARY APPENDICIES

Holt claims that unless she is reinstated CGI will have succeeded in creating a "chilling effect on the exercise of the legal rights of all persons protected by Title VII. . . and the Civil Rights Acts of 1866 and 1870 who are employed by Defendant." (Complaint, ¶66).

Holt offers no legal or factual basis for this argument and it must be dismissed. Nowhere in her voluminous filing with this Court does Holt refer to another CGI employee who, as a possible discrimination victim, may be deterred from exercising protected statutory rights based on Holt's current circumstances. To the contrary, Holt's claims are purely personal, representing the interests of nobody but herself.

Holt purports to be, in effect, a private attorney general under statutes

which encourage voluntary rather than coerced compliance. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974). Holt's position as a CGI attorney required her to assist in achieving compliance, not collecting alleged injustices to support her personal claims. (Comp. ¶ 8). Compare Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981). Thus, besides lacking evidence, Holt lacks standing to raise this claim. Even if the Commission, rather than Holt, asserted this "chilling effect" as a basis for injunctive relief, it would have to make a substantially stronger showing than Holt even attempts. EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981).

Holt cites Mead [Mead v. United States Fidelity and Guaranty Co., 442 F.Supp. 114 (D. Minn. 1977)] for the proposition that irreparable harm exists in the "chilling" of other employees' exercise of their statutory rights. However, the Mead injunction was also a final remedy, issued after a full trial on the merits and only after chilling effect was proven to the court. Holt had made no showing of how her discharge affected anyone else, much less how such showing could constitute "irreparable harm" to her. A showing by the cognizant agency that a firing had deterred other discrimination victims from testifying was rejected as insufficient for a preliminary injunction in EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981).

Finally, Holt cites Sheehan v. Purolator Courier Corp., 676 F.2d 877 (2d Cir 1982), for the proposition that the injuries she lists are now "recognized" as "irreparable in nature" (Br. 44), relying on this passage from the majority opinion:

> "Unimpeded retaliation during the now-lengthy (180-day) conciliation period is likely to diminish the EEOC's ability to achieve conciliation. It is likely to have a chilling effect on the complainant's fellow employees who might otherwise desire to assert their equal rights, or to protest the employer's discriminatory acts, or to cooperate with the investigation of a discrimination charge. And in many cases the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages."

Id. at 886-87

A fair reading of this passage shows that in the first two sentences the court was merely reconciling the statutory scheme of Title VII -- conciliation,

investigation, rights to protest or assert claims -- with its holding that a district court has jurisdiction to issue a preliminary injunction in aid of a private plaintiff who does not yet have a right-to-sue letter. The Sheehan majority did not expand the concept of "irreparable harm." It referred to it only in the last sentence, and then in traditional terms of "intolerable" hardship or humiliation. In fact, the Sheehan majority explicitly stated at the close of the opinion:

> In delivering this opinion, we do not alter the traditional showing that a party must make in order to persuade the court that injunctive relief is appropriate.

Id. at 887.